In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2019: 11

KENNETH HURF WILLIAMS

Appellant

-v-

THE QUEEN

Respondent

JUDGMENT

Appeal against conviction in the Magistrates' Court- Sexual Offences against a Child –Part X (Offences against Morality) of the Criminal Code – Whether Constitutional Rights to a fair trial within a reasonable time were infringed- Judicial Bias – Complaint of material non-disclosure to the Defence- Whether there was a misdirection on the law and facts- Complaint of Magistrate's Failure to properly consider the Defence Case- Refusal to hear supplemental submissions

Date of Hearing:	01 July 2020
Date of Judgment:	28 August 2020

Appellant	Ms. Sara Tucker, Trott & Duncan Limited
Respondent	Ms. Maria Sofianos for the Director of Public Prosecutions

JUDGMENT delivered by S. Subair Williams J

Introduction

1. The Appellant was tried, convicted and sentenced in the Magistrates' Court on an Amended Information (JEMS: 17CR00410) by Magistrate Tyrone Chin for the following offences against a female child:

Count 1
On a date unknown between 8 April 2014 and 20 April 2014, knowingly showed a 12 year old child offensive material namely, sexually explicit and You Tube videos contrary to section 182C of the Criminal Code (9 months imprisonment imposed)

Count 2
On a date unknown between 8 April 2014 and 20 April 2014, whilst being a person in a position of trust, did, for a sexual purpose, directly touch (with the hand) the breast of a young person under the age of 14 years old contrary to section 182B(1)(a) of the Criminal Code (section 182A(1)(a) appears to be a misstatement on the Amended Information) (6 months imprisonment imposed)

Count 3
On a date unknown between 5 August 2014 and 28 August 2015 whilst being a person in a position of trust, did, for a sexual purpose, directly touch (with the penis) the buttocks (under her clothing) of a young person under the age of 14 years old contrary to section 182B(1)(a) of the Criminal Code (section 182A(1)(a) appears to be a misstatement on the Amended Information) (18 months imprisonment imposed)

Count 4
On a date unknown between 5 August 2014 and 28 August 2015 whilst being a person in a position of trust, did, for a sexual purpose, directly touch (with the Appellant's penis) the buttocks (over her clothing) of a young person under the age of 14 years old contrary to section 182B(1)(a) of the Criminal Code (section 182A(1)(a) appears to be a misstatement on the Amended Information) (12 months imprisonment imposed)

Count 5
On 23 January 2016 intruded upon the privacy of a girl, in such a manner as to be likely to alarm a girl and did in fact alarm a girl, contrary to section 199(2) of the Criminal Code (6 months imprisonment imposed)

Count 6
On a date unknown between 5 August 2015 and 23 January 2016, in the Islands of Bermuda, wilfully and without reasonable excuse committed an indecent act in the presence of a child contrary to section 198(2) of the Criminal Code (9 months imprisonment imposed)

Count 8
On a date unknown between 1 January 2015 and 23 January 2016 did directly touch (with the Appellant's fingers) the vagina of a young person under the age of 14 years old contrary to section 182A(1)(a) of the Criminal Code (the term "child" appears to be a misstatement on the Amended Information) (18 months imprisonment imposed)

Count 9

On a date unknown between 1 January 2015 and 23 January 2016 did directly touch (with the Appellant's fingers) the vagina of a young person under the age of 14 years old contrary to section 182A(1)(a) of the Criminal Code (the term "child" appears to be a misstatement on the Amended Information) (18 months imprisonment imposed)

Count 11
On a date unknown between 1 January 2015 and 31 December 2015 did directly touch (with the Appellant's body) the body of a young person under the age of 14 years old contrary to section 182A(1)(a) of the Criminal Code (the term "child" appears to be a misstatement on the Amended Information) (18 months imprisonment imposed)

2. The misstatements on the charges identified above are of no real consequence to the issues of complaint on appeal. Section 182A pertains to the statutory meaning of a "young person" which is defined under section 182A(2) to be a person under the age of fourteen years. Unlike section 182A, section 182B applies to an offender who at the relevant time was in a position of trust or authority towards a young person. Also, unlike section 182A(2), a "young person" under section 182B(2) is more broadly defined as a person under the age of sixteen years.

3. The other distinction between section 182A and 182B relates to the maximum sentence of imprisonment which may be imposed on indictment. Under section 182A the maximum term of imprisonment on indictment is 20 years whereas the maximum penalty under section 182B (being in a position of trust or authority) is 25 years. However, there is no difference between the maximum sentence under section 182A and section 182B where sentence is to be imposed on a summary conviction. Whether or not the offender is in a position of trust or authority, the maximum sentence under both sections on summary conviction is 5 years imprisonment.

The Defence Statement at Trial:

4. On the Defence's pleaded case against the 2014 allegations, Mr. Williams had only just started dating his girlfriend, Ms. Theresa Rawlins. He said their relationship was new. Nevertheless, during this period they cohabited with her very young daughter and suffered the financial burden of household unemployment together. Mr. Williams' case was that the Complainant spent a one week period with him in the house with Ms. Rawlins and her daughter during August 2014. He claimed that he could not have possibly committed the 2014 offences because, without exception, he was out of the house on a daily basis in search of employment. He went so far as to say that he was out "*knocking on doors, chasing up leads and following up with old clients*". He described his days to have started at 7:30am averring that he did not return to his Spanish Point home until 4:00pm and sometimes 5:00pm. He denied ever having taken the Complainant to any marsh land area, maintaining that he had no means to do so. His pleaded case was that he walked back and forth from Spanish Point to Hamilton City each day job hunting during these long hours at the time he was said to have

committed these offences. His defence was thus an alibi defence. Otherwise, he said there was never a chance for him to be alone with the Complainant because when he was home both Ms. Rawlins, whom he loved, and her daughter were also present.

5. It was accepted in the Defence Statement that in August 2015 the Complainant spent three consecutive weeks with the Appellant, Ms. Rawlins (who was pregnant with a male child born the following month on 4 September 2015) and her now nearly-five year old daughter. This three week period was spent in the Appellant's Court Street residence. According to the Appellant, the Complainant's mother ("the Mother") said that in aid of accommodating the Complainant, she would provide the Appellant and Ms. Rawlins with money for food and necessities. The Appellant pointed out in his statement that she made a similar empty promise when the Complainant spent a week with them in 2014, so he did not believe that he would ever receive any such money, which in the end was never paid.

6. Mention is also made in the Defence Statement to two other 2015 visits by the Complainant to the Appellant's Court Street residence in 2015. The Appellant referred to an "*episode of theft involving money that* [the Complainant] *is said to have taken from her mother*" [paras 13-14 on page 18 of the Record]:

   "*When* [the Complainant] *had attend* [sic] *my home on those two occasions She told my girlfriend and me that she found the money which was approximately $100-$150. The first occasion she had $50.00 and I cannot remember if she had one or two $50.00 notes the second time. I'm not entirely sure of the exact amount now. We told her mom and at first she did not bat an eye but it was later discovered that this money was taken from her mother's sock draw. Her mother was up in arms at that and I recall her telling me distinctly that I should beat [the Complainant] when she was naked in the shower for taking her money. I remember being disturbed by that suggestion because I would never even think to strike my own kids in that way*."

7. The crux of the Appellant's defence to the 2015 allegations was stated in the Defence Statement as follows [paras 19-22 on Pages 20-21 of the Record]:

   "*19. These allegations are again being denied because they are untrue. They are untrue and I confirm such to be the case because I again was not in a position to have assault [sic] sexually or in any other way [the Complainant]. I was working this time and was not home during the working days at least and most times I was not in on the weekends as I was working several major renovation jobs during this period. So far as nights were concerned I was in the presence of friends almost on a nightly basis, including [the Complainant's father] who drank and relaxed at my residence regularly during the summer. They were often there when I got home from work and would be there well after I went to bed as they also slept over due to their state following nights of drinking.*

20. [Theresa's daughter and the Complainant] shared a room and I shared a room with Theresa. When [the Complainant] first came to the home I was working with Mr. Alfred Wolffe. We were renovating a home located at Abbott's Cliff belonging to the Trott's. This job commenced before the last week in July and ended on or about 15 August 2015. I did not and still do not have private transportation so I was catching the bus every day from town. I made 8:00am so I would leave at 7:15am and I worked until 5:00pm and needed to catch the bus back town. I got home every evening around 6:00pm and this cycled [sic] continued until I got my next job starting immediately after the Trott's job concluded as I was hired by my Uncle Hubert Douglas to dry walling and ceiling work.

21. My uncle's home was located at My' [sic] Lords' Lane in Hamilton Parish and I worked on his home and his brother's home, located in the same area, along with Ms. Teyonae Bean. Ms Bean was on clean up and she had a car so once the Abbott's Cliff work was completed I was being picked up by her approximately 7.15 every day and dropped off in between 4.00-5.00 pm until after [the Complainant] left the house. I remember this because Ms. Bean took [the Complainant] home once her mother was back during the time we were working in My Lord's Lane. This stands out because even though [the Mother] was back from her trip she did not call to collect [the Complainant]. We had to call [the Complainant] to find out if she was on Island and then arrange for [the Complainant] to be taken home. Luckily Ms. Bean was there to assist with transportation.

22. It was very sad that [the Mother] would not even come to collect her daughter after her marriage considering that before leaving she was promising [the Complainant] that she would be taken away to attend the wedding with her mother. We all thought so. This was not a time when I would abuse [the Complainant] in or outside of the home. I would not want any ill will to befall her even now despite all of this."

8. Although denying the allegations of showing the Complainant pornographic materials, the Appellant in his Defence Statement accepted that there were five DVD's seized from his Court Street residence. He stated that these DVDs belonged to Ms. Rawlins and explained; "*There is nothing specific I can recall about these apart from watching them with Theresa for short segments of time to heighten the mood between us*…".

9. In addressing the question as to whether the Complainant had access to the pornography and how that might have occurred, the Appellant pleaded [paras 27-29]:

"*27. …If I had to guess whether or not* [the Complainant] *has seen these movies I would have to say that it appears she has, but again that is not with me being present.*

28. What I do know of the DVDs is that Theresa moved them from the living room to the bedroom on to a shelf which contained her jewelry and personal belonging. I would

not call the shelf a high shelf but it was certainly not low. It was a little over midway up the wall.

29. At the time [the Complainant] *was over the house in August I was working daily, as in 7 days a week. I did not have a day off until my son was born on 4th September 2015. I slept after long hours of drinking following long days and I slept very soundly with that same mode continuing throughout the month. If I had to speculate I would say that* [the Complainant] ma*y have accessed the DVDs during the day whilst she was with Theresa. This was due to the fact that Theresa was heavily pregnant in her ninth month when* [the Complainant] *stayed with us and she was unemployed. She slept a lot of the time, from her reports to me due to her condition and the heat. It is my belief that these DVDs could have been removed by* [the Complainant] *from the room Theresa and I shared and viewed by* [the Complainant] *whilst Theresa was asleep.* [Ms. Rawlins' daughter] *would have been at Heritage Nursery during this time so would not have been home. I cannot take this assumption any further to say again that I did not watch these DVDs with* [the Complainant] *or any pornography with* [the Complainant]."

10. In respect of the January 2016 incident where it was alleged that another sexual assault took place, the Appellant in his pre-trial pleadings stated [para 41-42 on pages 25-26 of the Record]:

"*41. In January 2016 there is an event being alleged in which I sexually exposed myself to* [the Complainant] *and incited her to do the same and I believe asked her to take part in masturbatory acts in Pembroke. Save in so far* as [the Complainant] *alleges these incidents took place at her home* [in] *Southampton I deny that any such incidents or any instances similar in nature transpired between myself or* [the Complainant] *in Pembroke, Southampton or anywhere else.*

42. In January what [I] *recall and how I directly respond this allegation is as follows:*

a. I spoke to [the Mother] *over the phone on a Friday near the endo of the month of January.* [The Mother] *was telling me about [the Complainant's] grades in school and how well she was doing and that she was on the honour roll…*

b. I do remember offering to take [the Complainant] *with my family to Mr. Chicken for lunch as a treat to reward her for her recent success in school. Her mother agreed to it that Friday over the phone.*

c. …

d. [The Mother] *told me* [the Complainant] *was home and expecting me but never told me she was not feeling well or anything of the sort.*

e. *I went to collect* [the Complainant] *on my cousin, David Robinson's bike and I believe she may have seen me on that bike before this day but I cannot say for sure it was the bike we had travelled together on previously at this time, although it may have been. This was a blue and white Nouvo it did have black parts on the plastics.*

f. *I got there around 11:00 having left PW's Marina at roughly 10:30 am that morning.*

g. *When I got to the house I knocked and* [the Complainant] *let me in. I told her I was there to take her* [to] *lunch and she replied that she was not feeling well as she had cramps and on her period. I basically told her okay to* [too] *much information, but I stayed for a while and talked with her because she was all alone, as usual.*

h. *I asked* [the Complainant] *about school and congratulated her on her grades. I killed time and went through the DVDs in her collection because she was watching a movie in her mom's room. None of us really had cable so DVDs were are* [our] *only real source of entertainment. We all swapped them and borrowed frequently. I went through what was there but cannot recall anything specific accept* [except] *that there was a good mixture of new and old DVDs.*

i. *I sat off with* [the Complainant] *for a little while and although in my interview I said 30-45 mins I really cannot be sure. It's like asking how long is a piece of string, if you are not holding it and measuring it, it is hard to really be sure.*

j. *I left after a while because I had to drop David's bike back and meet up with Theresa. The plan was that I would pick up [the Complainant] bring her back to our house get read then walk to Mr. Chicken in town. Theresa was going to drop her back to her mom before her shift ended and I was to return to work after lunch if I recall. Since* [the Complainant] *did not come we never went and I dropped the bike and went back to work.*

…"

11. Mr. Williams concluded his Defence Statement as follows:

"*51. If I am asked why [the Complainant] is making these complaints against me I believe it may be as a result of broken promises or being told no and maybe in revenge for the Complaint made to DCFS which got her very negative attention. It is hurtful to now face this case after everything that has taken place and the friendships I have lost*

with [the Complainant's] parents as a result, but I do intend on facing it and defending it head on."

12. This is a summary of the Defence Case put forth by the Appellant prior to the trial.

The Grounds of Appeal

13. By an Amended Notice of Appeal dated 14 June 2020 (and filed in the Supreme Court on 17 June 2020) the Appellant pleaded the five separate grounds of complaint.

Ground 1

Length of Trial- Trial was unduly prolonged due to the Learned Magistrate['']s lack of trial management resulting in unfairness to the Appellant.

14. The offences for which the Appellant was convicted range over an 18 month period between June 2014 and January 2016. Nearly one year after the commission of the most recent offence, he was charged on 7 December 2016 on Information (16CR00554). On 30 March 2017 Information (JEMS: 17CR00151) was lain against him. This preceded the joinder of charges which led to the Amended Information containing the charges upon which he was convicted (i.e. JEMS: 17CR00410).

15. On 22 August 2017 the trial commenced and after a total count of 50 appearances during a 21 month period, convictions were entered on 15 May 2019.

16. The Appellant now complains that he was deprived of a fair trial within a reasonable period of time having regard to the timeframe between the start and conclusion of the trial. In arguing the Appellant's case, Ms. Tucker made the following statements on the subject of delay in her written submissions [paras 8-12]:

"*8. As set out, the first step is to consider the period of time which has elapsed. The date of calculation being of material value when deliberating on this point it is submitted that there are two relevant commencement dates the second of which being of most importance to this ground of appeal.*

9. The first date of consequence is the date the Appellant was initially charged under Magistrates Court Criminal Jurisdiction 16CR00554 on 7 December 2016. This charge sheet was followed by charge sheet 17CR00151 on 30 March 2017. The information was joined under Amended charge sheet 17CR00410 on 23 April 2017…It is appreciated that in the great majority of situations the date that an Appellant is charged is the traditional starting point for the calculation of the commencement of delay (footnoting para 21 of Dennis Robinson et al v The Director of Public Prosecutions et al [2019] SC (Bda) 60 Civ (13 September 2019)

10. The commencement date which is of significance to this ground is the commencement date of the trial and it is understood that there will however, be situations where a broader approach is required to be adopted in order to give full effect to the rights preserved by Article 6(1) (footnoting para 22 of Dennis Robinson). It is submitted that unlike the positions recorded which constitute time falling before the date of the charge, this Court can also consider time after the date which is the date of trial in this matter which began 22 August 2017 having been scheduled for two days.

11. The trial start date is significant as the trial which was initially scheduled for two days of hearing, in reality spanned 50 days ultimately concluding on 11 July 2019, approximately two years after the trial commenced. This number of appearances excludes all scheduled appearances preceding trial falling in between the first and second charge. It is submitted that the lapse in this period of time gives grounds for real concern.

12. As cited at paragraph 8 above, there are two consequences which follow. The first is for the Court to look into the detailed facts and circumstances of the case and secondly, it is for the contracting state to explain and justify any lapse of time which appears to be excessive. It is the Appellant's submission that not only was the lapse of time excessive but that it was not his fault and that the blame falls at the feet of the stat sitting as Wor. Magistrate Chin which was substantially affected and materially prejudiced the Appellant."

17. In addressing the question of cause for the delay, Ms. Tucker submitted [para 17]:

"*17. It is submitted that at no time did the Appellant make any spurious applications and challenges, nor did the Appellant change Counsel, absent himself or exploit procedural technicality. The Appellant appeared at every sitting, from the point of charge and continued to do so until his conviction. There were very few occasions in which the Crown or the Appellant's Counsel had personal reasons for non-attendance. It is submitted that the conduct of the Defence had little if any bearing on the delay*."

18. Ms. Sofianos, on the other hand, argued that the Court was concerned with up to 11 separate counts which had been joined on Information 17CR00410. Effectively, the Court was faced with hearing previously separate trial matters in one trial proceeding. She highlighted that these offences occurred years ago and spanned a three year period at multiple locations. Her point was that the complexity of all of this gave rise to a reasonable expectation for a longer trial.

19. In my assessment of the trial process I have undertaken a detailed and time-consuming review of the trial proceedings.

The Crown's Case

20. The Crown opened its case on 22 August 2017 and closed nearly one year later on 19 July 2018. Six witnesses were called, four of whom gave evidence *vive voce*. The evidence heard at trial is recorded by the magistrate in detailed handwritten notes which are 672 pages long. (Where I refer to these notes of the evidence I shall use the term "the Evidence" as that page numbering is separate from the page numbering of the Record of Appeal "the Record").

The Complainant's Evidence

21. Pursuant to section 542A of the Criminal Code ("*Measures to protect the complainant etc. in certain circumstances*") the Complainant's evidence was received remotely from outside of the Courtroom via Skype using the Government provided internet service. Sensibly, this mode of evidence-taking was unopposed by the Defence.

22. The video screen evidence was heard between 22 August 2017 and 30 October 2017. Out of that ten week period, the Complainant's evidence in chief took up only two days from 22 to 24 August. On the magistrate's note, the prosecutor asked 404 questions of the Complainant in examination in chief. (Fair to say, the examination in chief would have likely concluded on 23 August but for the temporary loss of Government internet on that fixed continuation date.)

23. However, the cross examination of the Complainant was considerably longer. According to the Record of Appeal, Ms. Tucker started her cross-examination of the Complainant on 24 August and concluded two and a half months later on 30 October 2017. The magistrate noted that she asked a total of 536 questions and it appears from an analysis of his particularly detailed notes that the aggregate timeframe of the cross examination lasted more than 7 ½ hours, to be contrasted against the Crown's 3 hour examination in chief and 30 minutes of re-examination.

<u>The Cross-Examination of the Complainant</u>:

24. On **24 August 2017** Ms. Tucker started her cross-examination of the Complainant at 3:36pm and continued up until 4:05pm when the Complainant asked for a break. Due to technical internet difficulties, the Court did not resume for the cross-examination until the following day for the afternoon session.

25. On **25 August 2017** Ms. Tucker resumed her cross-examination of the Complainant at 2:35pm and continued to put the Defence case that the Complainant rarely saw the Appellant while she was staying at his Spanish Point residence and that most of her time there was spent with the Appellant's girlfriend and her four year old daughter. Ms. Tucker repeatedly put it to the Complainant that she was lying about the 2014 allegations of sexual assault and the showing of pornographic materials. Ms. Tucker further cross-examined the Complainant on a previous incident where the Complainant

had admitted to stealing stolen money from her mother. On **25 August** the Complainant's evidence was stopped by the magistrate at 3:30pm on account of a report from the witness custodian that the Complainant was vomiting and feeling unwell.

26. The Complainant's evidence was scheduled to continue on **31 August 2017** at 11:30am. However, the matter did not proceed due to the prosecutor's inability to return to island from overseas. In a letter of correspondence dated 29 August 2017 from the Litigation Manager of the DPP's Office a request for an adjournment was made [page 293 of the Record]:

"*The above captioned matter is fixed for Thursday 31 August 2017…*

It is with regret that we are requesting that the above matter be adjourned for the following reason:

Our Maria Sofianos, Crown Counsel assigned… is currently on leave and will not be available to conduct this case on the designated date. In the circumstances, we are requesting that the case be adjourned on 31 August 2017. If possible, and if all are in agreement, we propose that the matter be continued on Friday 1st September 2017 @2:30p.m. …"

27. Accordingly, the matter was listed to **1 September 2017** when all parties appeared. Despite all efforts employed by the magistrate to continue the trial on **1 September**, the matter adjourned due to the malfunctioning of the Court internet system which was needed to access Skype for the Complainant's evidence. Accordingly, the case was adjourned to the following week on **6 September 2017**.

28. On **6 September 2017**, the Complainant was cross-examined throughout the course of the entire day, starting at 9:40am and breaking for lunch at 12:29pm and resuming at 2:41pm before concluding at 4:20pm. Ms. Tucker returned to questioning the Complainant about the stolen money and repeatedly put it to the Complainant that she was lying about the 2015 sex assault allegations.

29. Ms. Tucker's cross examination sketched the Appellant as a hard-working man employed in the construction industry working 7 days a week from approximately 7:15am through to 6pm. The theme of the cross-examination was that the Appellant had no real opportunity or desire to be alone with the Complainant and so was unable to commit any of the 2015 offences alleged. Ms. Tucker put it to the Complainant that the only occasion when the Complainant was alone under the Appellant's care was when he went to her (the Complainant's) home in search of food items.

30. However, the Complainant maintained her position under cross-examination that there were multiple occasions during which she was in the private company of the Appellant at his residence and Ms. Tucker cross examined the Complainant at length on each

related allegation of sexual assault. Ms. Tucker also cross examined the Complainant at lengths about the outdoor allegations including the Complainant's evidence that she sometimes accompanied the Appellant to his job sites, one of which she described the location to be in the area of Saltus Grammar School and the Lindo's grocery store in Devonshire Parish. Additionally, the Complainant was cross-examined on her evidence about the sexual assaults which occurred outside near Dellwood School and Bernard's Park.

31. In canvassing a trial continuation date, on 6 September 2019 at 5:32pm Ms. Sofianos sent an email to the Court proposing a 19 September 2017 fixture. She wrote [page 295 of the Record]:

"*Good afternoon Magistrate Chin,*

On my return to office I spoke with Ms. Clarke and we have reason to believe that Supreme Court #4 may be available on 19th September 2017 at 2:00pm. If that is the case, would it be possible to continue this trial on that date? With respect, I am of the view that we should make every effort to finish the cross examination and re-examination of the child witness. As I will be travelling I will copy in Ms. Clarke should you need to communicate with her in my absence.

I will reserve 30th October 2017 as the other possible date for the trial to continue if Commercial Court #2 is available…"

32. The matter was adjourned to 19 September when all parties reappeared. It is not apparent from the magistrate's note why the trial did not proceed on this date but it clear from an email sent at 1:03pm by Ms. Sofianos to the magistrate that Counsel were advised by the Court that the listing would be for a mention instead of a trial continuation. The prosecutor wrote [page 299 of the Record]:

"*Good afternoon Magistrate Chin,*

I had hoped that we would continue the trial today and we were prepared to have our witness ready. However when our Ms. Smith inquired yesterday she was advised by Mags Court staff that it was only a mention today…"

33. At 1:21pm Ms. Tucker emailed in reply [page 299 of the Record]:

"*Good afternoon,*
I am not in a position to proceed as I have set appointments on the basis that the matter would not be moving ahead today and Mr. Williams has been advised of the same.

I will be at Court 2 for 2:00pm"

34. In an email which followed the 2:00pm mention, Ms. Tucker wrote to the Court at 3:17pm [page 298 of the Record]:

"*Good afternoon,*

I write with respect to the above-captioned Criminal trial which was scheduled for mention this afternoon at 2:00pm…

Further to that hearing to that hearing it appears that in order to properly facilitate progress of this action and conclude the evidence of the child witness we will require a full day and then a further date to continue the Crown's case. As we are unable to schedule the matter to be continued during [the] school break we are seeking the Court's assistance in securing a Court so that we can confirm the date, produce the child and be in a position to complete her evidence without further interruptions to her.

We are aware that our ability to proceed is subject to the Court's availability but due to the delicate age of the complainant and the sensitive but serious nature of the allegations, we are hoping that a Court in either the Magistrate's Court or the Commercial Court will be available on the following dates:

1. *30 October 2017 (All day)*
2. *3 November 2017 (All day)*

Should there be a vacancy in either building we would be grateful…"

35. As requested in Ms. Tucker's correspondence, the matter was listed to **30 October 2017** at 9:30am. In an email preparatory to the **30 October** hearing, the Supreme Court Registry advised all parties on **19 September** in respect of the availability of the Commercial Courtrooms [page 297 of the Record]:

"*…I have confirmed with the Registrar that CCs, at Government Administration Building, is available on the following dates:*

1. *30 October 2017 – 2:30pm-4:30pm (1/2 day)*
2. *3 November 2017 – 9:30am -4:30pm (all day).*"

36. Ms. Tucker wrote to the Court [page 296 of the Record]:

"*We write now [to] simply enquire if the Court would be able to open at 1:00pm on 30 October 2017 so that we may have a greater chance at completing the evidence of the Child witness on this occasion.*

We truly do not wish to bring her back. This feeling is shared between the Crown and the Defence…"

37. The Supreme Court confirmed the 1:00pm Court availability but the matter proceeded at 1:42pm on **30 October 2017** and Ms. Tucker completed her cross-examination at 3:32pm.

38. That afternoon Ms. Tucker put it to the Complainant that the Appellant and Ms. Rawlins had accused the Complainant herself of inappropriately touching Ms. Rawlins' four year old daughter and that this made her angry. Ms. Tucker further suggested that this accusation provided the Complainant with the perfect opportunity to come forward and report the sexual offences committed by the Appellant on against her. Ms. Tucker put it to the Complainant that her failure to do so coupled with previous inconsistent statements were indicative of the fact that the offences never occurred. The Complainant, however, replied that she was scared that the Appellant would throw a tantrum and hit her [see page 127 of the Evidence]. Ms. Tucker also suggested that the Complainant's motive to lie about the sexual assault allegations was triggered by the Appellant's broken promise to host a birthday party for her.

39. Before completing her cross-examination, Ms. Tucker cross examined the Complainant on the occasion that the Appellant visited the Complainant's house while she was home alone. The case put was that he went there to take her out to lunch with the rest of his family in celebration of her school grade achievements. Ms. Tucker put it to the Complainant that her allegations that the Appellant pulled out a razor from the shower to shave and design her pubic hair were false and that the Complainant was also lying in saying that the Appellant left immediately after discovering she was on her menstrual cycle and refused to take her to lunch. Although rejected by the Complainant, the Defence case that the Appellant congratulated the Complainant on her school grades and left only after she stated that she was feeling unwell was put during cross-examination.

40. Ms. Tucker tirelessly and repetitiously cross-examined the Complainant throughout the two-month period from 24 August 2017 through to 30 October 2017 after the start of the school year. The Complainant was a vulnerable witness of 13 years of age when Ms. Tucker cross-examined her about sexual offences committed on her when she was 10, 11 and 12 years old. In aggregate, Ms. Tucker cross-examined the Complainant in excess of 7 ½ hours.

41. Seemingly, minimal efforts were made by the Defence to truncate the questioning or to spare the Complainant from prolonged questioning on less significant details which one might otherwise reasonably expect to see with the cross examination of a vulnerable witness. More so, the boundaries set by the rules of evidence on cross-examination were often and astonishingly ignored. At one point, Ms. Tucker even questioned the Complainant on her own previous sexual history suggesting that she had a previously been caught engaging in "inappropriate" activity with a boy (see page 112 of the Evidence). All of this to say that notwithstanding any mid-trial delays, the Defence was

never deprived of any reasonable opportunity to fully cross examine the Complainant and Ms. Tucker did so vigorously and uncompromisingly.

42. The re-examination of the Complainant by the prosecutor was completed within 30 minutes on **30 October 2017.**

Police Witness Statements Read into Evidence

43. The statements of Pauline Deshield and Joy Bean were read in on the **3 November 2017** continuation date.

The Mother's Evidence and Defence Application for a Mistrial

44. The Crown's examination in chief of the Mother started at 10:30am on **3 November 2017** and was completed on the same day at 2:52pm. Immediately thereafter, Ms. Tucker commenced her cross-examination by asking the Mother about her elder daughter, broaching a subject which I have found in my analysis of Ground 2 to be wholly irrelevant evidence. This, as may be gleaned from my narrative further below, led to an angry outburst from the Mother followed by an unsuccessful application by the Defence for recusal on the grounds of judicial bias. The magistrate's ruling on the recusal application was reserved to be handed down at the next Court appearance on **13 December 2017** when he delivered his reasons for refusing the application.

45. Having lost the recusal application, Ms. Tucker pressed for the magistrate to entertain an application for a mistrial grounded on the same facts. It is unfortunate and even dumbfounding that the magistrate permitted another adjournment of the trial for the filing of written submissions in aid of an obviously empty attempt by the Defence to make significance out of the same arguments which failed under the recusal application. In addition to adjourning for the day on **13 December 2017**, the Court vacated the **18 December 2017** hearing continuation date and set the matter down to be resumed on **16 January 2018**.

46. The wastage of trial time which occurred from 3 November 2017 on account of the Defence application for a mistrial was effectively conceded on **16 January 2018** when all parties reappeared before the magistrate and the Defence withdrew the application by a letter of correspondence to the Court, dated 5 January 2018, (filed on 8 January 2018) [page 312 of the Record]:

"*…we wish to indicate that upon review of the further law with respect to the application for dismissal Defence Counsel is now seeking to abandon that application an proceed with the trial.*

In the circumstances we ask that this matter be rescheduled for continuation after the submission of mutually agreed dates to allow the Court to set the matter in an available

Court as opposed to Counsel having to set a trial without knowing which Court is available.

We have copied in not only Ms. Sofianos but the Supreme Court as well so that they are aware of Counsel's intentions and may assist with the location of the continuation. As all may be aware this is a matter of a sensitive nature involving the accusation of a sexual assault on a minor which cannot be heard in the Magistrates' Family Court where Magistrate Chin sits. We therefore are seeking it to be set down for approximately 5 more full days in any other available Court…"

47. So, on **16 January 2018**, the magistrate adjourned the trial to continue on **1 February 2018**.

48. In my judgment, the Defence ought to have been made to complete its cross examination of the Mother at 2:53pm on 3 November. Instead three months were regrettably wasted appeasing the Defence in its pursuit of meritless applications i.e. the recusal application and the subsequent application for a mistrial.

49. The Mother was cross-examined by Ms. Tucker on **1 February 2018.** (I come to examine the content of this evidence more closely under Ground 2. Suffice to say, however, a leading portion of the questions posed by Ms. Tucker invited inevitable hearsay evidence and otherwise obviously irrelevant evidence which was regrettably permitted by the magistrate). Six subsequent trial appearances spanning an avoidable three and a half month period lapsed before Ms. Tucker finally concluded her cross examination of the Mother on **15 May 2018**. Within that timeframe, an adjournment was granted on **29 March 2018** to accommodate the both the Defence and the Crown [see page 323 of the Record]. Notably, the Crown's re-examination of the Mother lasted only a half hour.

The Police Witnesses Examined and Close of the Crown's Case

50. The examination of the Crown's final witnesses, Mr. Courtney G. Simmons and DS Renay Rock, was concluded on **19 July 2018**. It is not readily apparent to me why the matter resumed nearly two months later on **12 September** when the Crown formally closed its case.

<u>The Submission of No Case to Answer and Reserved Rulings</u>

51. On **12-13 September 2018** the Defence made a No Case to Answer submission. The magistrate reserved his ruling on the application to the return date fixed for **17**

September 2018. However, on the return date, the ruling was not delivered. At page 312 of the Evidence, the magistrate noted:

"*The Court in such a short time span could not properly draft a Ruling of no case to answer as this case merits time and the Court record since August 2017 is voluminous*.

ST [Ms. Tucker] *off island 18 September 2018 to 2 October 2018. ST is the junior in murder trial with Jerome Lynch QC until 12 October 2018*

The Court is off island from 29 September to 22 October 2018.

Adjourned to 2:30pm 31 October 2018 in Supreme Court 4 for Ruling. Bail extended.

The Court as time management plan ahead pencils in 7, 8, & 9 Nov 2018 for continuation in Supreme Court 4 if needed."

52. A ruling that there was a case to answer on Counts 1-6, 8, 9 and 11 was handed down on **31 October 2018**, a six week period from the date on which the application was reserved. It is accepted that a magistrate or judge will sometimes be faced with mid-trial applications which warrant or reasonably give rise to a short adjournment to facilitate a reserved ruling. However, it is expected and indeed the usual practice that mid-trial rulings will be made *ex tempore.* The expectation for *ex tempore* or swiftly delivered rulings during the course of a trial is to be contrasted against pre-trial and post-trial applications in criminal matters and final judgments and interlocutory rulings in civil proceedings. In this instance, I find that it would have been reasonable to expect the magistrate to provide an *ex tempore* ruling on the no case application or to have had the Ruling available for delivery on the 17 September 2018 return date. Instead the trial was further delayed to continue on 31 October 2018. So, I am bound to attribute the responsibility for the six week delay period which lapsed between 17 September 2018 and 31 October 2018 to the trial Court.

<u>The Defence Case</u>

53. The Defence case opened on **7 November 2018** with the evidence in chief of the Appellant which came to an end two days later on **9 November 2018**. The Court being unavailable to continue on **30 November**, set the matter to be resumed on **3 December 2018**. Ms. Sofianos started her cross-examination of the Appellant on 3 December 2018 and concluded on the return date fixed for **3 January 2019** when the re-examination by the Defence was also completed.

54. Before adjourning on **3 January 2019**, the Court informed the parties that the continuation dates were to be fixed for 7 January and 9-11 January 2019. The magistrate warned that if the trial did not conclude within the fixed timeframe it would be delayed

thereafter to continue in April or May 2019 due to the his recent re-assignment to sit in another Court.

55. On **7 January 2019** the Defence announced that it would be calling seven witnesses. Ms. Rawlins' evidence in chief started on 7 January and continued on **10 January 2019** and **11 January 2019**.

56. On **11 January 2019** Ms. Sofianos, having started her cross examination of Ms. Rawlins, informed the Court that she had just learned that the police had taken photographs of the Appellant's Court Street residence. This led to a meritless mistrial application by the Defence which usurped the **24-25 January 2019** continuation dates which followed.

57. Ms Rawlins' evidence resumed on **12 February 2019** and **19 February 2019**. On **19 February** and **5 March 2019** two more witnesses were called before the Defence closed its case on **18 March 2019**.

Closing Submissions, Judgment and Sentence

58. Closing submissions were fixed to be heard on **2 April 2019**. However, when the Court resumed on 2 April, Ms. Tucker stated that she was not yet prepared to make her final submissions. An adjournment was generously accorded for the following day on **3 April 2019** when both sides were heard and the matter was set for judgment to be delivered on **6 May 2019**.

59. On **6 May 2019**, the Court further adjourned to **15 May 2019** when the 16-page judgment was finalized and handed down.

60. Sentence was passed on **26 July 2019** after the Court received submissions from both parties and the Psychological Risk Assessment Report of Dr. Emcee Chekwas.

Analysis and Decision on Ground 1

61. Following the appeal hearing and without the leave of this Court, Ms. Tucker supplemented her submissions with the previous judgment of the Court of Appeal in *Andrew Robinson v Commissioner of Police [1995] Bda LR 64* where the question of an eight-month trial delay was examined by the Court of Appeal through a careful reconstruction of the trial history from the appeal record. Without much assistance from Ms. Tucker on the chronology on the trial appearances, I have done much the same.

62. As was the case in *Andrew Robinson* the Defence argue that the trial delay amounts to a breach of the Appellant's constitutional right to a trial within a reasonable time. Section 6(1) of the Constitution provides:

"(1) *If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law*."

63. In the *Andrew Robinson* case, the issue of particular concern was the prolonged adjournments between appearances and the four month delay which lapsed while the Defendant was awaiting judgment.

64. In this case, trial delays were attributable to the challenge faced by the Court to accommodate the trial in an appropriate Courtroom location; Government internet defects during the taking of remote evidence; adjournments granted at the behest of both the Crown and the Defence and limited dates of mutual availability between the Court and both parties.

65. More so, the Defence was responsible for the following unreasonable trial prolongations:

    (i) The two-month period during which the Defence excessively cross-examined the Complainant;

    (ii) The three-month period which was wasted in pursuit of the recusal application and the abandoned application for a mistrial;

    (iii) The three and a half month period during which the Defence excessively cross-examined the Mother; and

    (iv) The two-day period spent on the meritless application brought by the Defence for a mistrial arising out of the late disclosure of unused material.

66. Effectively, the Defence must shoulder the burden of at least eight months of trial prolongation out of the nineteen months spent by the Court on receiving the evidence for the Crown's case and the Defence case. This is in addition to the trial adjournments for which the Defence was responsible and the dates of Court availability on which the Defence did not avail itself. Clearly, the magistrate availed himself to continue and complete the trial over frequent intervals of Court appearances during the first year of the trial. However, the more time which passed, the more difficult it appears it became for the magistrate and the parties to accommodate one-week intervals between the Court appearances. In my view, had the Defence adopted a more practical and reasonable approach to the evidence, the Crown's case and the Defence case could have fully presented within the initial two month period spent by the Defence on cross-examining the Complainant.

67. On my assessment of the charges and the relevant evidence, the trial ought not to have been so extensively delayed. Unavoidably, it must be said that it was the duty of the magistrate to manage the trial and in this case he failed to keep sufficient command over the Defence's conduct at trial. That being said, the Defence must not be permitted to benefit from its own folly. The real question for my consideration is whether the magistrate's final judgment was clear and accurate despite the trial interruptions and whether the magistrate fairly determined the issues in question and came to the right result. This test is formulated out of the Court of Appeal's judgment in *Andrew Robinson* [page 5]:

"*I would not go so far as to say that such a disjointed process could never be a fair trial. There may be cases where the clarity and accuracy of the final ruling is such that it shows that despite an interrupted trial the Court has properly identified and fairly determined all the issues, and come to the right result*..."

68. In this case, I find that the magistrate's final judgment was clear, reasonably accurate and demonstrative of his grasp of the facts and issues before him. Where he otherwise may have erred, I find that, overall, he fairly determined the issues in question and came to the right conclusion.

69. For these reasons, this ground of appeal fails.

<u>Ground 2</u>

Judicial Bias/Conflict- The Learned Magistrates* [Magistrate] *erred in law by refusing an application for a stay of proceedings arising out of the material non-disclosure of relevant evidence to the detriment of the Appellant.

70. The Appellant's complaint arises out of the magistrate's refusal to recuse himself after having chaired Family Court proceedings related to the Mother and the Complainant's elder sibling. This was discovered at the outset of Ms. Tucker's cross-examination of the Mother which swiftly led to the Mother's emotional outburst at the magistrate. At pages 171-175 of the Evidence, the magistrate's handwritten note of these events reads as follows:

Q. Who is [sibling name]?
A. My eldest daughter
Q. Do you have any other children apart from [sibling name] and [Complainant]?
A. No I don't

[The Mother] *is agitated as she claimed that I (T. Chin) took her daughter* [sibling name] *from her years ago and that Sara Tucker who acts for the Def. is bringing up the*

topic of [sibling name]. *The witness is asked to wait outside. S Tucker said the evidence is relevant: -*

1. to establish who is in the home of the child [i.e. the Complainant]. *It goes to exposure to males. It goes to exposure to sexual pornographic material in the home by some other individual other than the mother. Suggested males have her in the home which has been denied by* [the Complainant].

2. We are talking about a living condition that is being made to look perfect than it actually is. One of my obligations is to test the credibility of this witness. A lot of it has to be her being an absent mother who leaves the country and leave the child [the Complainant] *with whoever and to establish a pattern. If this witness is to be truly tested a lot of that goes to her as a parent herself which is irrelevant and it is extremely material to this case. ST* [Ms. Tucker] *was not there 15 years when* [sibling name] *was removed from her care and I would like to get into the circumstances of it most definitely.* [The Complainant] *has made numerous allegations and we need to know why. ST* [Ms. Tucker] *said* [the Complainant] *is making allegations which are very serious and ST* [Ms. Tucker] *as Counsel is* [has a] *duty to challenge the witness and the Court has a duty to access* [assess] *the evidence.*

3. The witness said that I [the magistrate] *via the Family Court "took" her daughter* [sibling name] *away from her years ago and that the witness may bring this up time and gain* [again] *in her evidence.*

In reply MS [Ms. Sofianos] *said it came as a surprise to the Crown and to ST* [Ms. Tucker]. *MS* [Ms. Sofianos] *did not know the situation. It is* [a] *hot and emotive topic for* [the Mother]. *MS* [Ms. Sofianos] *has the Defence statement of Kenny Williams and in it are no remarks about* [sibling name]. *The remarks are about* [the Complainant] *and if ST* [Ms. Tucker] *wishes to set up a poor mothering defence than the remarks ought to be about* [the Complainant]. *This line of defence was not mentioned in S. Tucker's outline of her Defence. MS* [Ms. Sofianos] *this Family Court matter is too far removed from the* [the Complainant] *matter and if we go down that road this put the Court in a predicament which I (T. Chin) presided over 15 years ago and we could be flirting with a mistrial situation.* [The Mother] *was satisfied that* [sibling name] *was not in her care. ST's* [Ms. Tucker's] *angle is other people in the home.* [Sibling name] *would have a boyfriend who could have touched* [the Complainant]. *ST* [Ms. Tucker] *can subpoena* [sibling name] *if she wishes.*

The Court will reserve its judgment to the next sitting….

<u>Ruling</u>

The Court heard Ms. Tucker and Ms. Sofianos in reply. It is an emotive topic for the witness [the Mother] *regarding the Court's involvement some 15 years ago. I*

personally do not remember or recall the facts or the scenario of that case as there have been thousands of cases the Court has heard since. The Court rules that for the overriding objective and for proper conduct of this case the Court sees fit that we must proceed.

ST [Ms. Tucker] *said due to the outburst of the witness in the last hearing that she is instructed to apply for a mistrial.*

ST asks for adjournment to make application for mistrial. It is perceived bias against the Defendant that [the Mother's] *evidence may be tainted as a result* [of] *recollection of the removal of her first child [*sibling name]. [Sibling name] *and* [the Mother] *may try to overcompensate.* [The Mother] *made* [illegible] *outburst against this Court and her evidence may be tainted- : reducing her credibility and that this Court may overcompensate or give more credit to her evidence in the continued questions by ST* [Ms. Tucker].

In reply MS [Ms. Sofianos] *said any questions about collateral issues: ST* [Ms. Tucker] *can only go so far. If ST* [Ms. Tucker] *wishes to make* [the Mother] *an unfit mother then she has much room. How far can ST* [Ms. Tucker] *go 15 years ago in the Family Court before* [the Complainant] *was born? Some mental gymnastics is required. The bias is in the Defendant's favour. The issue with the other daughter is a collateral issue. Was* [the Mother] *an unfit mother to this child? What more? Is it a fishing expedition by ST? This was not in the Defence Statement re: the eldest daughter. Is this to upset* [the Mother] *who must be protected? This is for this case and not about the case 15 years ago*."

71. In Ms. Tucker's written submissions before this Court she argued that the questions she proposed to ask the Mother about the Complainant's sibling were probative and "*relevant to not only the child but the mother's credibility*." At paragraph 27 of her written submissions she contended:

"…*Counsel applied for the Learned Magistrate's recusal and the Appellant believed the history between the Court and the witness and the nature of the allegations and circumstances would either taint the quality of the witness' evidence and/or skew the Court's reception of said evidence*."

72. In her written submissions, Ms. Tucker relied on a previous decision from this jurisdiction of Court where Wade-Miller J in *F v F* [2014] SC (Bda) 78 Div (25 August 2014) compiled examples of situations which call for the recusal of a judge [para 31]:

"*A judge will take him/herself off a case if there is a direct connection between the judge and the case. Examples include, but are not limited to, situations where the judge:*

- *is an Appeals Court judge and was also a trial judge;*
- *has a financial or personal interest in the result of the case;*

- *is related to a party in the lawsuit;*
- *is, or acts in a way to suggest he/she is, personally biased or prejudiced against a party or party's Counsel…*"

73. The case of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 decided in the Court of Appeal of England and Wales was cited with approval by the Privy Council in the consolidated appeals of *Millar v Elgin* and *Payne et al v Procurator Fiscal, Dundee* [2001] UKPC D4. The *Locabail* judgment [paras 2-3] featured in Lord Bingham of Cornhill's judgment of the Board [para 17]:

"*In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of the individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.*

Any judge…who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge…or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

74. Beyond the rare question of actual bias, the appearance of judicial impartiality is measured by whether, on the objective viewpoint of a fair-minded and informed observer, there is a real possibility or real danger of bias on the part of the judge (See *Porter v Magill* [2002] 2 AC 357). Lady Justice Arden (as she then was) in *Mengiste & Anor v Endowment Fund for the Rehabilitation of Tigray & Ors* [2013] EWCA Civ 1003 described the appearance of impartiality in these words: "…*Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially...*"

75. Yet there remains some legal elasticity in the task of assessing judicial bias through the rear view image afforded to an appellate Court, more so in civil proceedings than in criminal proceedings. The central question is whether the proceedings were nevertheless fairly conducted in the round. Such a notion was recognized by Lord Clyde in his concurring judgment of the Privy Council's decision in *Millar v Elgin* and *Payne et al v Procurator Fiscal, Dundee* [para 81]:

"*As matter of generality a lack of independence in the tribunal may not necessarily be fatal to the validity of a hearing. The recent decision of the House of Lords in R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389 provides one example where in the particular context of town and country planning an overall fairness in the process may be achieved despite a lack of independence in one of the stages. In such cases the global view of the whole proceedings may make it possible to conclude that overall there was a fair trial. But it is important to notice that the impartiality of the tribunal in criminal cases is not a matter which can be cured by the existence of a right of appeal to a court which itself satisfies the requirements of article 6(1) (De Cubber v Belgium (1984) 7 EHRR 236. In Findlay v United Kingdom (1997) 24 EHRR 221 the Court held that the lack of independence of the tribunal in court-martial proceedings was not remedied by the presence of safeguards, which included an oath taken by the court-martial board, and stated p 246 (para 79):*

> "*Nor could the defects…be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as 'criminal' under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of article 6(1).*" "

76. Ms. Tucker clarified that her complaint against bias falls under the more popular category of an appearance of bias rather than actual bias. Indeed, Magistrate Chin's position was that, unsurprisingly, he had no recollection of the relevant Family Court proceedings.

77. In a jurisdiction as small as Bermuda it is an accepted reality that magistrates and judges are sometimes called upon to conduct trials involving a defendant previously tried by the same bench. This is particularly so in the case of repeat offenders well known to the Courts. In such instances, the Court is expected to adjudge each case on the evidence and merits of the case. Such judicial maturity is a must in small jurisdictions which cannot reasonably be expected to have the resources to provide a new tribunal for every occasion that such an offender reappears before the Court for a new matter.

78. This same point must therefore apply to a witness who has appeared before the same Court in previous proceedings. Whether any such connection will give rise to a judicial conflict will depend on the facts of each individual case. No doubt, determining factors on the question of an appearance of impartiality will often include some consideration

of the timespan which has lapsed between the different matters in question. In other cases, the question of bias might turn on the significance of the common witness to the present proceedings and whether, as a matter of importance to the present case, that witness is to be assessed on his or her credibility. So, where a witness was recently determined by the Court in an earlier case to be an especially honest or dishonest witness, the same judge or tribunal may properly be recused from assessing the credibility of that same witness in new proceedings where the credibility of that witness is a relevant and contested issue.

79. In this case, I find that the Appellant's asserted fear of impartially lacks objective justification. In my judgment, the subject-matter of the allegation of bias is far removed from the relevant facts of this case. Whether or not the Mother competently performed her duty to parent the Complainant's sister is wholly irrelevant to any element of the criminal charges on which the Appellant was convicted. The clear basis of the application for recusal was hinged on the magistrate's involvement in a Family Court case which proceeded 15 years ago and prior, in any event, to the birth of the Complainant. Those proceedings had not one iota to do with the Complainant herself or the allegations against the Appellant. Under these circumstances, it could not be seriously argued by a fair-minded and informed observer that there is a real danger that the magistrate's mind was in any way closed or incapable of an impartial assessment of the mother's credibility by reason of an unrelated Family Court case of 15 years prior.

80. Further or alternatively, the mother's credibility was of no real consequence to the relevant and material parts of the evidence in this case. It was accepted on the Defence case that the mother travelled to Jamaica and left the Complainant in Bermuda under the Appellant's care. Where the Defence challenged this evidence, it was suggested that the Mother was mistaken on her dates of travel, not that she was lying about her travels and not that she was lying about having left the Complainant in the Appellant's care.

81. All the same, it is true that the Defence attacked the Mother's credibility and sought to establish that she was lying on various occasions throughout her evidence. However, on each such occasion that the Defence accused the Mother of lying, the targeted subject-matter of the evidence was either of a remote or collateral nature or outright inadmissible hearsay evidence.

82. At one point the Defence put it to the Mother that she was lying in her evidence about the nature of her (the Mother's) relationship with a male person unrelated to these proceedings. [See page 188 of the Record]. The obvious purpose of this evidence was to establish that this third party had private access to the Complainant in her home. This evidence was clearly intended to advance the speculative notion that the Complainant could have been exposed to the pornographic materials in question through any other adult in her proximity other than the Appellant. Supposing that this was the true value

of that evidence, it would have been sufficient for the Defence to put it to the Mother that the Complainant's domestic environment exposed her to other persons of adult age.

83. Either way, when one takes a global look at the relevant and admissible evidence given by the Mother, it is fair to say that it was largely unchallenged in its material parts. This is all to say that the Mother's evidence was not centrally damaging to the Defence case. She was not a witness who gave direct evidence about the commission of the alleged offences. Instead, her evidence was principally corroborative of circumstantial factors.

84. It was wholly reasonable for the magistrate to have refused the recusal application as it related to a witness of whom he could not reasonably or fairly be expected to recollect. More so, the witness herself was not the kind of witness on which the Crown's case would have stood or collapsed.

85. For all of these reasons, I find that this ground of appeal fails.

Ground 3

Material nondisclosure of relevant evidence – The Learned Magistrate erred in law by refusing an application for a stay of proceedings arising out of the material non-disclosure of relevant evidence to the detriment of the Appellant.

86. This ground of appeal is formed out of a complaint concerning the Crown's late disclosure of unused material. It is not a question of non-disclosure nor does it relate to any evidence relied on by the prosecution.

87. By way of background, the Crown's compliance with its disclosure obligations was certified by a Notice of Compliance dated 27 April 2017. The Appellant's Defence Statement was filed on 22 August 2017, i.e. on the start-date of the trial and nearly 17 weeks after the filing of the Crown's Notice under sections 3 and 4 of the Disclosure and Criminal Reform Act 2015 ("the 2015 Act"). Section 5 of the 2015 Act calls for the Defence Statement to be filed and served within 28 days after the prosecution discloses its case under section 3 (not to be confused with unused material under section 4).

88. It appears that an application for an extension of time to disclose its case was made by the Crown. So, I am unable to state with precision the extent to which the Defence Statement was filed and served late. Notwithstanding, it is fair to say that it was belatedly produced. At page 2 of the Evidence the magistrate noted:

"*10:55 am* [22 August 2017] *The Court adjourns this matter* [delaying the start of the Complainant's evidence in chief] *to 2:30pm today to read the lengthy and very late Defence. Bail extended*."

89. Having filed the Defence Statement on the first day of the trial, the Appellant now sees fit to ground his complaint on the Crown's belated service of unused material. The unused material in question consists of photographs of the Appellant's former Court Street apartment.

90. The value of this evidence, according to Ms Tucker during her oral submissions, was to provide this Court with an illustration of the general layout of the Appellant's residence. The Appellant argues that these photos would have assisted the Defence's case by establishing that the apartment was too small for the Appellant to have been able to commit a sexual assault on the Complainant while others were present at the same residence. In any event, the general layout of the 2 bedroom Court Street apartment was established on the evidence.

91. Putting aside the background reasons for the late disclosure (which may very well be without sufficient justification), I see no reason why the Defence would have been admitting the photos as part of the Defence case. After all, these photos were disclosed on 18 January 2019 i.e. before the close of the Defence case and months prior to the termination of the trial on 11 July 2019.

92. For these reasons, I find that this ground of appeal must also be refused.

Ground 4

Misdirection on the law and facts - The Learned misdirected himself on the law and fact*[s] *evidenced by the Judgment.

93. Ms. Tucker's primary complaint under this ground attached the magistrate's misuse of the term "fiduciary" in his judgment. The primary offending passage is to be found in the opening paragraph of the judgement:

"…*The Defendant is Kenneth Williams, who is the [description of familial relationship stated] of [the Complainant]. The role of…is a position of trust especially when asked by a biological parent to look after and care for [the Complainant] for a period of time. Defendant was entrusted to care for [the Complainant] in a fiduciary capacity which the Defendant could not delegate. The Defendant had a duty of care to [the Complainant], and at all times*."

94. Ms. Tucker accepted that the term "fiduciary" was erroneously employed to describe the statutory language "position of trust" or "position of authority" and she also accepted that the evidence established that the Appellant was in fact in a position of trust and authority over the Complainant.

95. I find that magistrate's awkward use of the terms "fiduciary" and "duty of care" did not have the effect of rendering the conviction unsafe as he was clearly referring to the nature of the relationship between the Appellant and the Complainant. If the Appellant had reason to complain that the evidence did not show the Appellant to be in a position of trust or authority, as is statutorily required in respect of the offences contrary to section 182B, then it would be open to the Appellant to argue that the magistrate's error was of significance. However, given that the Appellant accepts that he was indeed, on the evidence, in a position of trust and authority, I find that nothing much turns on the magistrate's puzzling use of these civil law terms.

Ground 5

Failure to properly consider the Defence Case.

96. In her written submissions, Ms. Tucker described this ground to be the most significant and profound ground of appeal. Notably, I have already addressed some of the particulars of this ground in the foregoing part of this Judgment.

97. Otherwise, the general theme of this ground was that the magistrate failed in his judgment of the case to consider the evidential replies by the Defence to the Crown's case. While Ms. Tucker accepted that the magistrate had no obligation to make mention of each point comprising of the Defence case in his judgement, she maintained that the trial judgment was imbalanced in favour of the Defence. I do not propose to restate the particulars of the Defence evidence which is said to have been stated at pages 20-28 of the Appellant's written submission.

98. The fact of the matter is that the magistrate accepted the Complainant's evidence and rejected Mr. William's evidence. The absence of reference to the details listed did not, in my judgment, leave the summation and the findings of the trial Court imbalanced. On my assessment, many of the points raised by the Appellant for inclusion in this regard were more argumentative than factual in any event. For example, the Appellant often challenged the veracity of the Complainant's evidence by questioning the likelihood or plausibility of the Defence embarking on the level of risk. In this context the Appellant also argues that the Magistrate ignored the evidence in support of the Defence case that Mr. Williams had minimal opportunity to commit the offences in question. However, the magistrate was not bound to accept these synopses argued by the Defence nor was he bound to make specific mention of it in his final summary of the evidence. After all, the trial evidence was particularly voluminous for a Court of summary jurisdiction and so it is understandable that some of the rejected theories were omitted from the wording in the final judgment.

99. The Appellant further complained that the magistrate was mistaken on certain stated facts. At subparagraphs i) and j) of her written submissions at page 23, Ms Tucker stated that the magistrate erred on the date range within which the Appellant was alleged to

have taken the Complainant to lunch. In my judgment, the significance of this error is minimal at best as the occurrence of the lunch event itself was founded on strong and corroborated evidence. I also find that the Appellant, under this ground of complaint, misinterpreted the magistrates' elaboration on the evidence of the Appellant's lunch arrival [see para (10) at page 33 of the Record]. I do not accept that the magistrate described this as a separate or second incident or that he appears from his judgment to have confused the material evidence of this incidence.

100. Ms. Tucker also complained that the magistrate failed to give the Appellant the benefit of a good character direction. I find that this complaint has no merit whatsoever. The Appellant, who had previous convictions for criminal offences (possession of cannabis and unlawful wounding), never made an application to the magistrate for a good character direction. Further, it is beyond difficult to envisage how the magistrate could have properly allowed a good character direction in respect of a Defendant who not only had previous criminal convictions but who also, during cross-examination, impugned the character of both the Complainant and the Mother. [See pages 177 and 188 of the Appeal Record]. I find that the Appellant had no legitimate entitlement to a good character direction.

101. For these reasons, this ground of appeal also fails.

Appellant's Request to make Supplemental Submissions

102. Nearly a week following the hearing of this appeal, the Appellant filed a summons for the listing of a further hearing so that submissions could be made on the *Andrew Robinson* case which had not previously been placed before the Court:

103. By an accompanying letter dated 6 July 2020 Ms. Tucker wrote, *inter alia*, to the Court:

"…*At the beginning of the hearing, Ms. Tucker expressed concern about the time allocated for the hearing. The Judge stated that Ms. Tucker need not address her on the law but was to focus on the evidence. Accordingly, Ms. Tucker did not address the Judge on the law. It has since become apparent that a critical authority in relation to Ground A of the appeal (the length of the trial resulting in unfairness) was not before the Judge. The authority is a decision of Ground J (as he then was) in Andrew Robinson v Commissioner of Police [1995] Bda LR 64, which is binding on the Judge, particularly in light of its approval by the Court of Appeal in R v Brown [2012] Bda LR 21 (paragraph 7). Unfortunately, this omission was not identified as no submissions were made on the law at the hearing per the Judge's direction.*

We respectfully request that the parties be able to make submissions in relation to this authority that is central to the issue of delay. As matters stand, the Judge has no heard submissions on the case, which goes directly to: (a) the issue the Judge raised in relation to why the Appellant had not sought constitution relief during the Magistrates Court proceedings; and (b) the specific type of delay in the present case, namely delay in the conduct of the trial rather than a delay in bringing the matter to trial.

We consider there is a substantial risk of injustice to the Appellant if the Judge does not consider, and hear, submissions on this authority which is clearly directly applicable to the Appellant's appeal. Further, it is plainly in accordance with the Overriding Objective in Rule 1.1 of the Criminal Procedural Rules 2013 (the "CPR") namely, recognising the rights of the defendant particularly those under section 6 of the Bermuda Constitution (see Rule 1.1(c) of the CPR), that submissions on the relevant law that go to that right to be hear.

We therefore ask that a hearing be set with a time estimate of 1.5 hour at the Court's earliest convenience, so that the parties may address the Judge in relation to this critical authority. We consider that the Judge is empowered to set down the requested hearing by virtue of the Judge's case management powers generally, Rule 1.1(e) of the CPR (dealing with the case efficiently and expeditiously), and because the interests of justice require it."

104. Ms. Sofianos was invited to state the Crown's position in response to the Appellant's request for a further hearing. The following reply was provided:

"...I have no recollection of the Court directing either party not to make submissions on the law. I object to a listing for further oral submissions.

Should Justice Subair Williams wish to listen to the recording of the appeal, which took place over video link, the appeal started around 250 pm. There was some general discussion and about five minutes into the appeal, and at 255 pm or so Ms. Tucker addressed on the ***Fiduciary Ground****. She then went to the* ***Length of Trial Ground****. My note is that Justice Subair Williams queried had Ms. Tucker raised any challenge in the lower court. Ms. Tucker said no formal challenge was made. Not long after Ms. Tucker advised she would move on from that point and moved on to the* ***Bias Ground...****"*

105. In deciding this issue, I have reviewed the procedural history of this file. It should not be overlooked that this matter was first listed before me on Thursday 12 September 2019 for a directions hearing, as is the usual practice for appeal cases to be heard in the Supreme Court. Directions hearings are an integral part of the case management scheme as it is the stage of the appeal process which is expressly dedicated to airing out any case management concerns or issues preparatory to the substantive hearing. This would have been the appropriate point for either side to propose an allotted timeframe for the hearing. However, in the absence of any specification by

Counsel for the need for a longer hearing, the usual half-day time frame was fixed and directions were issued for the filing of skeleton arguments and a joint-authorities bundle. I also confirmed the parties' agreement that there would be no need to obtain transcripts of any portion of the trial evidence and that the magistrate's notes in the Record of Appeal would suffice. The hearing of the appeal was accordingly fixed for 8 January 2020.

106. On the day prior to the listed hearing, Ms. Tucker filed an *ex parte* summons to be released as attorney of record. Suffice to say, the application was granted and the appeal hearing was administratively adjourned.

107. On 13 February 2020, the matter was listed before Simmons J for another directions hearing and the appeal hearing was fixed to 6 May 2020. Due to the Court closures related to COVID-19, the matter was further relisted to 1 July 2020. (It is unclear from the Court record at which point Ms. Tucker was readmitted as Counsel of Record.)

108. What is sufficiently clear is that a request was never made at any point during the 9 month period which lapsed between 12 September 2019 and 30 June 2020 for more time than that which was afforded to the 1 July 2020 hearing. Ms. Tucker, herself, accepted that she first raised her concerns about the time allotment at the outset of the substantive 1 July 2020 hearing.

109. It is also noteworthy that the Appellant was permitted to usurp, in aggregate, at least 30 minutes of hearing time on 1 July to speak with her client privately on two separate occasions. When she stated her concerns at the start of the hearing that the hearing time might prove inadequate, I encouraged her to start her submissions and to make the best of the time given. In the end, Ms. Tucker concluded her submissions without further complaint and she made use of the opportunity to reply to the Crown's submissions without any suggestion that the remaining time had deprived her of the opportunity to address the Court in fullness.

110. I now turn to Ms. Tucker's written statement that she was given a direction that she 'need not' address the Court on the law and that 'accordingly' she did not address me on the law. Immediately prior to the start of Ms. Tucker's oral submissions, she inquired whether I had had sight of her written submissions and whether I would find it helpful for her to begin by addressing me on any specific part of her submissions. In direct response to her query, I stated:

"*I'll make one observation- I thought it would be helpful if you concentrated more on the evidence than the law in the initial presentation of your submissions. I think that we can come to the legal submissions, which are probably not very contentious, in the final part of your presentation of your appeal- but at this point, really, I would encourage you to focus on the evidence*."

111. Further into Ms. Tucker's oral submissions, on the subject of unreasonable delay under her first ground of appeal, I asked her whether an application had been made to the magistrate for a mistrial or stay of charges or whether any application on an Originating Motion pursuant to section 15 of the Bermuda Constitution had been previously made in the Supreme Court. She informed the Court that no application of the sort had been made and she proposed to move on from this ground of complaint if my question signified that the Court was of the view that such an application ought to have been made. The Court's immediate response to Ms. Tucker was this:

"*I don't want to stop you from making your submissions so if you want to persuade me that, notwithstanding the absence of any application having been made before now, it is a ground that is meritous, then please make your submission*."

112. Having invited Ms. Tucker to proceed with her submission, she paused and then replied:

"*My lady I am going to move on from that point. I am going to move on to Ground B*…"

113. Notwithstanding, Ms. Tucker's apparent abandonment of her first ground of appeal during her oral submissions, I have carefully considered the written arguments she advanced on the complaint of unreasonable trial delay.

114. Ms. Tucker is plainly wrong in stating that she was directed not to address the Court on the law. At her own request, she was given some insight into the Court's preference to be addressed on the relevant evidence prior to being addressed on the applicable law. Further, when the point and opportunity arose for her to address me on her first ground of appeal on the issue of delay and the effect, or lack thereof, of not having previously made an application for the abortion of the trial, she declined to do so of her own volition. Clearly, Ms. Tucker's reliance on the *Andrew Robinson* case was an after-thought, evidenced by the fact that neither that decision nor the Court of Appeal's judgment in the *Brown* case was cited in her written submissions or included in her authorities bundle.

115. What was correctly stated is the Court's duty to manage cases expeditiously and efficiently. It surely cannot be open to litigants to take a second bite at the cherry merely because one may have forgotten or simply omitted to raise a point later appreciated only with the benefit of the hindsight.

116. It is in consideration of all of these factors that I find that Ms. Tucker had ample opportunity to address the Court in the hearing of this appeal and that there is no basis upon which the Appellant could reasonably expect to address the Court in a further hearing, particularly in light of my inclusion of the newly filed authorities in my deliberations.

Conclusion

117. For all of the reasons stated herein, I have dismissed the appeal on all grounds.

Dated this 28th day of August 2020

_____

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE